

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

NOVELTY, INC.,)	
)	
Plaintiff,)	
vs.)	NO. 1:04-cv-01502-DFH-TAB
)	
KAREN TANDY,)	
JOHN ASHCROFT,)	
)	
Defendants.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

NOVELTY, INC.)	
)	
Plaintiff,)	
)	
v.)	
)	
KAREN TANDY, Administrator, U.S. Drug)	CASE NO. 1:04-cv-1502-DFH-TAB
Enforcement Administration, and)	
ALBERTO GONZALES, Attorney General)	
United States Department of Justice,)	
each in their respective capacities)	
)	
Defendants.)	

ENTRY ON OBJECTION TO MAGISTRATE JUDGE'S DISCOVERY ORDER

Plaintiff Novelty, Inc. brought this case against the Administrator of the U.S. Drug Enforcement Administration ("DEA") and the Attorney General of the United States. On September 1, 2005, Magistrate Judge Tim A. Baker ordered that discovery between the parties be stayed pending the outcome of defendants' motion to dismiss. Novelty filed a timely objection to Judge Baker's Order pursuant to Rule 72 of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(A), arguing that the decision is clearly erroneous and contrary to law. For the foregoing reasons, Novelty's objection is overruled and Judge Baker's Order is affirmed.

Background

As part of its business, Novelty sells “List I” chemicals that are regulated by the DEA. Novelty is subject to statutory and regulatory requirements pertaining to List I chemicals. In May 2004, Dan E. Raber of the Indianapolis Office of the DEA sent a letter to Novelty pertaining to the overnight storage of List I chemicals. The letter included three scenarios apparently aimed at clarifying the requirements for proper storage. The DEA subsequently issued a subpoena (“the Arkansas subpoena”) to Novelty in July 2004, requesting the company’s sales invoices for List I chemical products. Novelty filed this action for declaratory and injunctive relief in September 2004. Novelty alleges that Raber’s letter amounted to a final agency action of rule-making without notice and comment in violation of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* and the Due Process Clause of the United States Constitution. The complaint also sought a declaration that the Arkansas subpoena was invalid because it was based upon improper rule-making.¹

Novelty served its first discovery requests on defendants in May 2005. On June 21, 2005, defendants filed a motion to dismiss. Defendants’ motion to dismiss raised four issues: (1) whether any United States District Court may exercise jurisdiction over an appeal of the agency action; (2) whether the agency

¹The Arkansas subpoena was withdrawn on August 8, 2005. Docket No. 44, Ex. 1. Accordingly, Novelty withdrew its challenge to that subpoena. Docket Nos. 44 at 16, 55 at 10. The DEA’s Indianapolis office issued a different subpoena to Novelty on August 8, 2005. Novelty has not challenged this new subpoena.

action amounts to a reviewable “final agency action”; (3) whether the complaint should be dismissed for failure to state a claim; and (4) whether there was any bar to issuance of a subpoena. Docket No. 31 at 1-2. On June 27, 2005, Magistrate Judge Baker held a telephonic conference to discuss discovery. Novelty then sent defendants a Rule 30(b)(6) deposition notice. Despite prior representations that they would agree to at least some discovery, on August 29, 2005 defendants moved to stay all discovery and to quash Novelty’s deposition notice. Novelty responded with a motion to compel discovery.

Magistrate Judge Baker held a hearing to address the discovery disputes on August 31, 2005. During the hearing, defendants withdrew their arguments on the third and fourth issues presented in their motion to dismiss, which Judge Baker characterized as “merits-based arguments.” Additionally, at some point during the hearing, Novelty agreed with defendants that “it needed no discovery to respond to Defendants’ jurisdictional arguments.” See Docket No. 43 at 7. Judge Baker found that the proper course of action under such circumstances would be to stay all discovery until the jurisdictional questions presented by defendants’ motion to dismiss had been decided.

Novelty then filed an objection to Judge Baker’s order, arguing that it should be permitted to conduct discovery as to the second issue: whether the letter sent by Raber amounted to a reviewable “final agency action.” Its concession that discovery was unnecessary as to jurisdiction, Novelty argues,

pertained only to the first issue in defendants' motion to dismiss. Novelty argues that without discovery on the second issue, such as discovery pertaining to who authorized the letter, it will be unable to respond to defendants' argument that the letter does not amount to final agency action. The deadline for Novelty's response to defendants' motion to dismiss has been stayed pending the outcome of its objection to Judge Baker's order.

Discussion

I. Standard of Review

Rule 72(a) of the Federal Rules of Civil Procedure provides that a district court shall modify or set aside only those portions of a magistrate judge's order that are "clearly erroneous or contrary to law." Therefore, this court shall not overturn a magistrate judge's ruling unless the court is "left with the definite and firm conviction that a mistake has been made." *Weeks v. Samsung Heavy Industries*, 126 F.3d 926, 943 (7th Cir. 1997).

II. Jurisdiction

The defendants argue that this court must not permit Novelty to conduct its discovery because the court does not have jurisdiction. Defendants argue that jurisdiction of this matter lies exclusively with a Court of Appeals in accordance with 21 U.S.C. § 877, which states:

All final determinations, findings, and conclusions of the Attorney General under this subchapter shall be final and conclusive decisions of the matters involved, except that any person aggrieved by a final decision of the Attorney General may obtain review of the decision in the United States Court of Appeals for the District of Columbia or for the circuit in which his principal place of business is located upon petition filed with the court and delivered to the Attorney General within thirty days after notice of the decision. Findings of fact by the Attorney General, if supported by substantial evidence, shall be conclusive.

Novelty argues that it does not challenge any final determination, finding, or conclusion of the Attorney General. Such determinations are made pursuant only to quasi-adjudicative rulings after hearings on the record, Novelty claims. See *PDK Labs Inc. v. Reno*, 134 F. Supp. 2d 24, 29 (D.D.C. 2001) (DEA refusal to provide a letter-of-non-objection for importation of listed chemical was not a final determination, finding, or conclusion under § 877 subject to review only in court of appeals); *Oregon v. Ashcroft*, 192 F. Supp. 2d 1077, 1085-86 (D. Ore. 2002) (holding that § 877 applies only to a quasi-judicial determination in a specific case after administrative proceeding), *reversed in relevant part by* 368 F.3d 1118, 1120 (9th Cir. 2004), *aff'd on the merits by Gonzales v. Oregon*, 126 S.Ct. 904 (2006). Rather, Novelty claims that it challenges the letter as improper rule-making, which is governed by 21 U.S.C. § 821, and not § 877. The Ninth Circuit found this argument unpersuasive. The court held that where the Attorney General's interpretive rule imposed obligations and sanctions in the event of violation of its provisions, jurisdiction in the district court was improper. *Oregon v. Ashcroft*, 368 F.3d at 1120.²

²The defendants argued in their Notice of Supplemental Authority that the
(continued...)

Magistrate Judge Baker held that the issue of jurisdiction would be best left to the parties' arguments pertaining to the defendants' motion to dismiss, but he noted that the agency action at issue does not appear to be governed by § 877. Docket No. 43 at 6. This court agrees that the question of jurisdiction is best addressed on the defendants' motion to dismiss. Because this rarely-addressed issue has produced differing results in federal courts, the court cannot say with a "definite and firm conviction" that Judge Baker's preliminary jurisdictional assessment was mistaken. See *Weeks*, 126 F.3d at 943. Accordingly, the court sees no reason to disturb Judge Baker's preliminary jurisdictional assessment. However, just as Judge Baker found, this court finds that the mere likelihood that the court is capable of ordering discovery on this matter does not automatically warrant such an order.

III. *Discovery*

Novelty contends that discovery is necessary to respond to the defendants' argument that the letter was not "final agency action" reviewable under the Administrative Procedure Act, 5 U.S.C. § 704. To be a final agency action, the

²(...continued)

Supreme Court's recent affirmance of the Ninth Circuit's analysis regarding whether an interpretive rule pertaining to physician-assisted suicide exceeded agency authority under the Controlled Substances Act also support's the Ninth Circuit's jurisdictional determination as well. Docket No. 56. The defendants concede, however, that the Supreme Court did not address the issue of district court jurisdiction, nor was there any reason for the Court to do so. Accordingly, the Supreme Court's opinion in *Gonzalez v. Oregon* is not relevant to the jurisdictional question at issue in the present case.

letter must satisfy two conditions: (1) the letter must mark the consummation or completion of the agency's decision-making process; and (2) the action in issuing the letter must be "one by which rights or obligations have been determined, or from which legal consequences flow." *Home Builders Ass'n of Greater Chicago v. U.S. Army Corps of Engineers*, 335 F.3d 607, 614 (7th Cir. 2003), quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). Novelty claims that it cannot show that the letter marks the completion of the agency's process without knowing more about the events leading up to the issuance of the letter and others like it, such as when and by whom such letters were authorized.

Novelty's argument misses the mark. Though the language of the first prong of the finality test refers to the agency's decision-making process, courts' application of this part of the test looks primarily to the language or character of the action to determine whether the action represents "a merely tentative or interlocutory" statement, *Bennett*, 520 U.S. at 178, meaning that the agency action is not final, or whether the action amounts to "a definitive pronouncement" of final agency action. *Home Builders*, 335 F.3d at 615; see also *Acker v. EPA*, 290 F. 3d 892, 894 (7th Cir. 2002) (finding EPA order was of a tentative nature by looking to its terms; mere possibility of future action did not demonstrate finality); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000) (analyzing the finality of an EPA Guidance under the first prong, finding finality where the language was "unequivocal"). Novelty has not presented, and the court is not aware of, any case law suggesting that the procedural details Novelty seeks

regarding the inner workings of the agency would be relevant to the court's analysis of whether the letter amounts to final agency action by the DEA. Because the traditional inquiry under the first prong of the finality test will likely focus on the binding or discretionary nature of the letter's language, the court finds that Judge Baker's order was within the law.

Conclusion

Accordingly, Novelty's objection to Judge Baker's September 1, 2005 order staying discovery, denying Novelty's motion to compel discovery, and quashing Novelty's Rule 30(b)(6) deposition notice is OVERRULED. Novelty shall file its response to the defendants' motion to dismiss within ten days of this entry in accordance with Judge Baker's September 22, 2005 Order. Docket No. 53.

So ordered.

Date: February 3, 2006

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

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